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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

EVANS, INC., *Petitioner*

v.

LARRY P. SPIERER, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. In submitting to the jury the causation question in an age discrimination case, must the trial judge state that the plaintiff is required to prove that his age was a "determinative factor" in the decision to terminate him, or is other wording permissible?

2. Must a trial judge, without a specific request, allow counsel an opportunity to object to a flawed jury charge?

3. When an incorrect age discrimination charge was given, was a judgment for the plaintiff (who was only 43 years old when he was terminated) the result of "plain error"?

LIST OF PARTIES

Evans, Inc., petitioner, and Larry P. Spierer, respondent, were the only parties to the proceedings below. Evans, Inc. has no parent company and has no subsidiaries except wholly owned subsidiaries.

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Petition for Writ of Certiorari

The petitioner, Evans, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceedings on January 13, 1995.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is not officially or unofficially reported, and is reprinted in the Appendix, p. A-1, *infra*. The trial court sat with a jury and did not issue an opinion.

JURISDICTION

The decision of the Court of Appeals for the Fifth Circuit, and its judgment, were issued on January 13, 1995. Evans did not request rehearing.

Jurisdiction of this Court is granted by 28 U.S.C. § 1254.

Larry P. Spierer filed his employment discrimination lawsuit in the United States District Court for the Western District of Texas, San Antonio Division, in 1991. Spierer primarily sought, and was granted, relief under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.* Evans appealed the adverse judgment to the Fifth Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTE AND RULE INVOLVED

This case involves a provision of the ADEA and a procedural rule.

29 U.S.C. § 623(a) (ADEA):

> It shall be unlawful for an employer – (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. . . .

Rule 51, Federal Rules of Civil Procedure:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the

requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

Spierer managed the Koslow's[1] store in San Antonio, Texas, when his employment was terminated in 1991.

Spierer, who was only 43 years of age at the time, has maintained – and Evans consistently has denied – that Evans unlawfully terminated him because of his age.

Spierer was about age 31 when Evans hired him. Riding the crest of the Texas oil boom, Evans opened its San Antonio store in 1985 and appointed Spierer, who then was about 37, to manage it.

The regional manager over Koslow's left Evans early in 1991; his replacement, Martin Cohen, is approximately the same age as Spierer. Also early in 1991, Ronni Stern, about nine years older than Spierer, was promoted to vice president over all of Evans' United States stores.

Cohen and Stern perceived numerous and varied problems with Spierer's San Antonio store on their first

[1] Evans now operates four Koslow's stores in Texas. Koslow's stores offer luxury clothing of fur and leather. Koslow's, Inc. is a wholly owned subsidiary of Evans, Inc.

visit there in 1991. Stern's career has been in retailing. She testified that Spierer's store exhibited "a lack of excitement, a lack of motivation, a lack of understanding. . . ." Cohen directed Spierer to remedy the deficiencies, which ranged from using improper, unattractive garment hangers to failing to open incoming shipments of merchandise.

Spierer had not cured the problems when Cohen again inspected the store in a month or two, a fact that Cohen reported to Stern.

Stern sat on Evans' executive committee, all of whose members but one were older than Spierer.

The executive committee decided to terminate Spierer, who learned of his termination on March 4, 1991, from Cohen and Evans' human resources director. Spierer was told that the reasons for his termination were "poor performance" and "failure to meet company expectations," coupled with general concern with his management style.

Four months later Spierer complained to the Equal Employment Opportunity Commission of his termination, noting that his replacement (the former assistant store manager) is some ten years younger.

Spierer sued Evans in the U.S. District Court for the Western District of Texas, which had undisputed jurisdiction under 28 U.S.C. §§ 1331, 1343 and 29 U.S.C. § 626.

At trial, the jury was instructed to find for Spierer if he satisfied them that his age was "one of the reasons" for his dismissal. The trial judge at no point told or intimated to counsel that the time was ripe for objections to

his charge, and neither party objected to this incorrect instruction.

The jury answered "yes," i.e. that Spierer's age was a reason for his dismissal. Subsequently, in response to a separate instruction that did use the "determinative factor" wording, and a corresponding question, the jury found for Evans on the willfulness issue. The jury found that Spierer was entitled to $74,764.28 in back pay.

The trial judge denied reinstatement; instead, he awarded $70,952.05 in front pay. Spierer lost on his claim that Evans had violated COBRA (Consolidated Omnibus Budget Reconciliation Act) with regard to the continuation of health insurance benefits. Spierer also was awarded attorney's fees, court costs, and interest.

Evans timely appealed to the U.S. Court of Appeals for the Fifth Circuit, challenging the faulty jury instruction on causation and insisting that the error was "plain" or "fundamental," thereby entitling Evans to a new trial. Evans also argued that the trial judge's failure to hold a charge conference or otherwise to accommodate objections to the charge was erroneous in light of the clear error in the wording of the charge.

A panel of the Court of Appeals for the Fifth Circuit did not dispute Evans' allegation that there was error in the jury charge. According to abundant case law the charge should have asked the jury whether Spierer proved that his age was a "determinative factor" in the decision to terminate his employment. Appendix, p. A-4.

Nevertheless, the Fifth Circuit affirmed judgment for Spierer on its finding that he put before the jury "some

evidence" that his age was a determinative factor for his discharge, thereby making error in the actual charge harmless. Appendix, p. A-8.

Moreover, the Fifth Circuit found no reversible error in the trial court's failure to provide counsel an opportunity to object to the charge. Appendix, pp. A-3, A-4.

ARGUMENT

1. TO ESTABLISH CAUSATION IN AN ADEA CASE, THE PLAINTIFF SHOULD BE REQUIRED TO MEET THE "DETERMINATIVE FACTOR" TEST.

Evans' initial brief and its reply brief in the Court of Appeals focused on a claimed harmful error in the wording of the jury charge that the trial judge gave.

The jury was instructed to return a verdict for Spierer if it found that his age was "one of the reasons" for his discharge. Appendix, p. A-2. The jury answered that question "yes." Appendix, p. B-1.

Evans maintained on appeal that abundant case law required the trial court to inform the jury that Spierer must demonstrate that his age was "a determinative factor" in Evans' decision to terminate him.

In response, Spierer's argument defended the charge given while admitting that Evans' brief cited cases that set forth the essence of a required issue in an age discrimination case.

The opinion of the Court of Appeals fails to cite any precedent for the lenient "one of the reasons" standard that the trial court adopted. However, the Court of Appeals sidestepped the issue of how a district judge

should submit the causation question to a jury. Instead, the Court of Appeals said that it would assume that the jury charge and interrogatories, as a whole, *did not* clearly and accurately convey the appropriate legal standard to the jury. Appendix, p. A-6.

The decision of the Court of Appeals, while mildly critical of the charge given, creates uncertainty about what wording should be used to ask a jury whether an age discrimination plaintiff has proved causation.

Although the Fifth Circuit did not look beyond its own cases in examining this question, an almost contemporaneous decision of the Court of Appeals for the Seventh Circuit harshly criticizes the "determinative factor" test in an age discrimination case. *Gehring v. Case Corp.*, 43 F.3d 340, 66 F.E.P. Cases 1373 (7th Cir. 1994).

In *Gehring*, the trial court's jury charge adopted the "determinative factor" wording which Evans believes should have been used in this case. *Id.*, 66 F.E.P. Cases at 1375. The jury returned a verdict for the defendant employer, *id.* at 1374, and plaintiff appealed.

The Court of Appeals for the Seventh Circuit devoted approximately half of its opinion to scathing criticism of the "determinative factor" jury charge, which it denigrated as containing "arcane, cabalistic, inscrutable, ambiguous, and unnecessary words." *Id.* at 1376.[2]

The bench and the bar, then, are left in considerable doubt about what is (or are) the correct method (or methods) of instructing a jury on causation in an ADEA case. Is it acceptable to inform the jury, as was done in

[2]Despite its distaste for the jury charge, the court affirmed judgment for the employer. *Id.*

this case, that a plaintiff merely must demonstrate that his age was "one of the reasons" for the employer's adverse action? Should the trial court instruct a jury that a plaintiff may prevail only by proving that his age was "a determinative factor," as Evans argued in the Fifth Circuit, not without grudging success but without a clear holding? Or is the Seventh Circuit correct in insistently advocating its "what if" charge, i.e., what would the employer have done "if the employee had been younger than 40 and everything else had remained the same"? *Gehring, supra*, 66 F.E.P. Cases at 1376.

Only this Court is authorized to resolve this uncertainty and to dictate a uniform national standard for use in the large number of age discrimination trials that juries must decide each year.

2. THE TRIAL JUDGE SHOULD HAVE ALLOWED OBJECTIONS TO THE CHARGE AT A SPECIFIC POINT IN THE TRIAL.

The Court of Appeals for the Fifth Circuit incorrectly repudiated Evans' contention that the trial court's failure to hold a charge conference or otherwise to hear objections to the charge excuses the failure of Evans' trial attorney to object to the erroneous charge.

At no point in the trial did the judge say a word to the attorneys about the content of the charge, nor did he signal directly or indirectly that he might entertain objections. Instead, immediately after the charge was read, he called for final argument from the attorneys.[3]

[3]Given an option, the attorneys for both parties chose to argue after, rather than before, the judge read the charge to the jury.

Without recess or other pause after final argument, the trial judge ordered the jury: "Okay. You may now go back and start your deliberations."

In short, Evans argues, the trial judge violated Rule 51, Federal Rules of Civil Procedure, because he did not allow counsel an "[o]pportunity . . . to make any objection out of the hearing of the jury."

According to the Court of Appeals for the Fifth Circuit, which relied on only two cases, a district judge has no obligation to provide counsel an opportunity to object. Appendix, p. A-4. In effect, the Court of Appeals required Evans' trial counsel, in the presence of the jury, to butt in and figuratively countermand the judge's order to "go back and start your deliberations."

In the situation in which Evans' attorney found himself, the Fifth Circuit virtually would require trial attorneys to say: "Not so fast, your Honor; what about hearing some objections to your charge?"

Evans contends that Rule 51 required the trial judge at a minimum, upon the conclusion of final argument, to say to the attorneys something along these lines: "Before the jury begins deliberating, is there anything further from either side that we need to discuss at the bench?" If the charge had been perfect, the omission of such a cue would have been harmless. But here, as has been demonstrated, the charge did contain a serious defect, and Evans was harmed by not being prompted or allowed to object to the charge outside the presence of the jury.

As the Court of Appeals for the Seventh Circuit correctly observed:

> The final sentence of the rule which states, "Opportunity shall be given to make the objection out of the hearing of the jury," protects the parties from prejudicing the jury by having to make apparent to them who has lost the battle over instructions.

Hetzel v. Jewel Companies, 457 F.2d 527, 535 (7th Cir. 1972).

Not only was the jury in this case in the courtroom, but it received an order from the trial judge to "go back and start your deliberations" the instant that Spierer's attorney concluded her final argument.

Evans' remedy should be precisely what the Seventh Circuit prescribed in *Hetzel, supra*, 457 F.2d at 536:

> In this case, as for the future, we believe that an appropriate cure for failures by trial courts to comply with the intent of Rule 51 is to relieve the party aggrieved thereby of the operation of the prohibition against asserting as error the giving of or failure to give an instruction to which objection has not been made.

This case, accordingly, affords this Court an opportunity to interpret the final sentence of Rule 51 and to specify what remedy is available to a litigant whose attorney is not accorded a proper opportunity to object to a defective jury charge without obviously informing the jury that he disagrees with the judge's pronouncement of the law.

3. THE JUDGMENT FOR SPIERER WAS THE RESULT OF "PLAIN ERROR."

Plain or fundamental error, not harmless error, led a misinformed jury to side with Spierer and to rule that his termination from Evans was unlawful.

By no means was Spierer the only manager whom Evans terminated in or near 1991. The group of released Evans managers included some younger than age 40 as well as others who were 40 or more.

The reasons that Evans gave to Spierer at age 43 for his termination were "poor performance" and "not meeting company expectations." The Court of Appeals brushed aside these reasons as "general statements." Appendix, p. A-7.

Evans also terminated an under-40 store manager for what both parties agreed was sexual harassment. His off-payroll documents did not state: "Fired for sexually harassing a female subordinate." Instead, the stated reason was "Mismanagement." Another under-40 manager was let go for the stated reason that his store was "not showing results." Appendix, p. A-7.

The Court of Appeals found "contrast," equivalent to "some" circumstantial evidence of age discrimination, in the mere wording of Evans' off-payroll documents. Appendix, p. A-7. This is despite the unequivocal testimony of Evans' human resources director, Dean Obrecht, that no such distinction is made on the basis of age when management employees must be dismissed. Moreover, Spierer himself admitted to nearly all the deficiencies (ranging from failing to open boxes of expen-

sive merchandise to leaving defective store lighting fixtures uncorrected) that his two supervisors, Cohen and Stern, noted on their first visit to his store. The Court of Appeals offered no explanation of why it considered "mismanagement" to be more specific and less general than "poor performance." Nor is it explain how "poor performance" could be code for "too old" while "mismanagement" equates to "younger than 40."

"Plain error" was found in a case in which, like this one, the charge contained inconsistencies *and* the jury requested a copy of the instructions. *Nowell by and through Nowell v. Universal Elec. Co.*, 792 F.2d 1310, 1316 (5th Cir. 1986).

After deliberating less than an hour, the jury in this case sent to the judge a note requesting that the charge be reread, or that a copy of it be sent to the jury room. The record does not contain a rereading of the charge, nor does it show that the trial judge answered the jury note, so it is uncertain whether or not a copy of the charge was delivered to the jury.

Certainly the jury easily could have been hopelessly confused, because the causation section of the charge adopted the "one of the reasons" test but the next section, addressing the willfulness issue, spoke of Spierer's age as a "determinative factor" in the decision to terminate him. Similar confusion was found sufficient reason to reverse and remand in *Nowell, supra*, 792 F.2d at 1317-18.

Another Fifth Circuit case that was reversed and remanded because of confusion and inconsistency within a jury charge is *Davis v. Ector County, Tex.*, 40 F.3d 777

(5th Cir. 1994). In that case, the Fifth Circuit reversed the district court "because the instructions tendered to the jury were sufficiently vague as to permit uncertainty as to the correctness of the verdict." *Id.* at 786. The same situation exists, and the same remedy would be proper, in this case because, as in *Davis*: "Although it is impossible to say whether the jury properly understood the law . . . , the instruction that was given prejudiced the defense." *Id.* at 787.

Further, the Court of Appeals erred in allowing Spierer to prevail upon a production of "some evidence," because that ruling cannot be squared with *St. Mary's Honor Center v. Hicks*, 509 U.S. _____ , 113 S.Ct. 2742, 125 L.Ed. 2d 407 (1993).

The Fifth Circuit recently interpreted *St. Mary's* in *Rhodes v. Guiberson Oil Tools*, 39 F.3d 537 (5th Cir. 1994). According to the Fifth Circuit, a "subsidiary holding" of *St. Mary's* is that:

> To establish that a proffered reason for an action taken by an employer was "pretext for discrimination," the plaintiff must show *both* that the employer's proffered reason was false *and* that discrimination was the real reason.
>
> . . .
>
> [I]t is clear that the Supreme Court ruled against the theory of "pretext only" under which a Title VII plaintiff automatically wins if she successfully shows that the reasons proffered by her employer for her termination are factually false.

Rhodes, *supra*, 39 F.3d at 542 (emphasis in the original).

In the present case, the Fifth Circuit did not require Spierer to produce even "some evidence" that Evans' stated reasons for terminating him (poor performance and failure to meet company expectations) were false *and* in addition to offer "some evidence" that age discrimination was the "real reason" for his termination.

In short, Spierer failed to present the jury "some evidence" that his age was a determinative reason for his termination. The trial court's approval of the verdict, and the entry of judgment, were fundamentally erroneous, and the Court of Appeals' decision perpetuates denial of a correct and fair trial.

CONCLUSION

The numbers of age discrimination administrative charges and lawsuits are unlikely to diminish in the foreseeable future. By hearing this case, this Court has an opportunity to instruct the lower federal courts (where most ADEA cases are tried) as to the correct terminology to use in submitting the causation issue to juries, as well as to elucidate a trial judge's Rule 51 responsibility to receive objections to a jury charge.

Respectfully submitted,

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